

# GERAGOS & GERAGOS

A PROFESSIONAL CORPORATION  
LAWYERS

HISTORIC ENGINE CO. NO. 28  
644 SOUTH FIGUEROA STREET  
LOS ANGELES, CALIFORNIA 90017-3411  
TELEPHONE (213) 625-3900  
FACSIMILE (213) 232-3255  
GERAGOS@GERAGOS.COM

MARK J. GERAGOS SBN 108325  
(mark@geragos.com)

BEN J. MEISELAS SBN 277412  
(meiselas@geragos.com)

Local Counsel for Plaintiff and the Proposed Class

Brian J. Wanca  
(bwanca@andersonwanca.com)

**ANDERSON + WANCA**  
3701 Algonquin Road, Suite 760  
Rolling Meadows, IL 60008  
Telephone: 847-368- 1500  
Fax: 847-368-1501

*[Pro Hac Vice pending]*

Counsel for Plaintiff and the Proposed Class

## UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

ERIC B. FROMER CHIROPRACTIC,  
INC., a California corporation,  
individually and as the representative  
of a class of similarly-situated persons,

Plaintiff,

v.

MOLINA HEALTHCARE OF  
CALIFORNIA; MOLINA  
HEALTHCARE OF CALIFORNIA  
PARTNER PLAN, INC.; MOLINA  
HEALTHCARE, INC.; and JOHN  
DOES 1-10,

Defendants.

Case No.: 2:15-cv-6403

### CLASS ACTION COMPLAINT

1 Plaintiff, ERIC B. FROMER CHIROPRACTIC, INC., (“Plaintiff”), brings  
 2 this action on behalf of itself and all others similarly situated, through its attorneys,  
 3 and except as to those allegations pertaining to Plaintiff or its attorneys, which  
 4 allegations are based upon personal knowledge, alleges the following upon  
 5 information and belief against Defendants, MOLINA HEALTHCARE OF  
 6 CALIFORNIA, MOLINA HEALTHCARE OF CALIFORNIA PARTNER PLAN,  
 7 INC., MOLINA HEALTHCARE, INC. and JOHN DOES 1-10 (“Defendants”).

### 8 PRELIMINARY STATEMENT

9 1. This case challenges Defendants’ practice of sending unsolicited  
 10 facsimiles.

11 2. The federal Telephone Consumer Protection Act of 1991, as amended by  
 12 the Junk Fax Prevention Act of 2005, 47 USC § 227 (“JFPA” or the “Act”), and the  
 13 regulations promulgated under the Act, and the California Business Code at §  
 14 17538.43 prohibits a person or entity from faxing or having an agent fax  
 15 advertisements without the recipient’s prior express invitation or permission. The acts  
 16 provide a private right of action and provide statutory damages of \$500 per violation.  
 17 Upon information and belief, Defendants have sent facsimile transmissions of  
 18 unsolicited advertisements to Plaintiff and the Class in violation of the JFPA and §  
 19 17538.43, including, but not limited to, the facsimile transmission of unsolicited  
 20 advertisements on or about November 21, 2014, November 24, 2014, December 8,  
 21 2014, December 29, 2014 and January 6, 2015 (“the Faxes”), true and correct copies  
 22 of which are attached hereto as Exhibit A and made a part hereof. The Faxes promote  
 23 the services and goods of Defendants. Plaintiff is informed and believes, and upon  
 24 such information and belief aver, that Defendants have sent, and continue to send,  
 25 unsolicited advertisements via facsimile transmission in violation of the JFPA and the  
 26 California Business Code § 17538.43.

27 3. Unsolicited faxes damage their recipients. A junk fax recipient loses the  
 28 use of its fax machine, paper, and ink toner. An unsolicited fax wastes the recipient’s

1 valuable time that would have been spent on something else. A junk fax interrupts the  
 2 recipient's privacy. Unsolicited faxes prevent fax machines from receiving authorized  
 3 faxes, prevent their use for authorized outgoing faxes, cause undue wear and tear on  
 4 the recipients' fax machines, and require additional labor to attempt to discern the  
 5 source and purpose of the unsolicited message.

6 4. On behalf of itself and all others similarly situated, Plaintiff brings this  
 7 case as a class action asserting claims against Defendants under the JFPA and the  
 8 California Business Code § 17538.43.

9 5. Plaintiff is informed and believes, and upon such information and belief  
 10 avers, that this action is based upon a common nucleus of operative facts because the  
 11 facsimile transmissions at issue were and are being done in the same or similar  
 12 manner. This action is based on the same legal theory, namely liability under the  
 13 JFPA and the California Business Code § 17538.43. This action seeks relief expressly  
 14 authorized by the JFPA and the California Business Code § 17538.43: (i) injunctive  
 15 relief enjoining Defendants, their employees, agents, representatives, contractors,  
 16 affiliates, and all persons and entities acting in concert with them, from sending  
 17 unsolicited advertisements in violation of the JFPA; and (ii) an award of statutory  
 18 damages in the minimum amount of \$500 for each violation of the JFPA, and to have  
 19 such damages trebled, as provided by § 227(b)(3) of the Act.

## 20 JURISDICTION AND VENUE

21 6. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 and 47  
 22 U.S.C. § 227.

23 7. Venue is proper in this District because Defendants committed a statutory  
 24 tort within this district a significant portion of the events took place within this  
 25 District.

## 26 PARTIES

27 8. Plaintiff, ERIC B. FROMER CHIROPRACTIC, INC. ("FROMER"), is a  
 28 California corporation with its principal place of business located in Los Angeles, CA.



1 urgent communications their owners desire to receive.

2 18. Defendants' facsimiles did not display a proper opt-out notice as required  
3 by 47 C.F.R. 64.1200.

### 4 **CLASS ACTION ALLEGATIONS**

5 19. In accordance with F. R. Civ. P. 23(b)(1), (b)(2) and (b)(3), Plaintiff  
6 brings this class action pursuant to the JFPA, on behalf of the following class of  
7 persons:

8  
9 All persons who (1) on or after four years prior to the filing of this action,  
10 (2) were sent telephone facsimile messages of material advertising the  
11 commercial availability or quality of any property, goods, or services by or  
12 on behalf of Defendants, and (3) which Defendants did not have prior  
13 express permission or invitation, or (4) which did not display a proper opt-  
14 out notice.

15 Excluded from the Class are the Defendants, their employees, agents and members of  
16 the Judiciary. Plaintiff reserves the right to amend the class definition upon  
17 completion of class certification discovery.

18 20. Class Size (F. R. Civ. P. 23(a)(1)): Plaintiff is informed and believes,  
19 and upon such information and belief avers, that the number of persons and entities of  
20 the Plaintiff Class is numerous and joinder of all members is impracticable. Plaintiff  
21 is informed and believes, and upon such information and belief avers, that the number  
22 of class members is at least forty.

23 21. Commonality (F. R. Civ. P. 23 (a) (2)): Common questions of law and  
24 fact apply to the claims of all class members. Common material questions of fact and  
25 law include, but are not limited to, the following:

- 26 a) Whether the Defendants sent unsolicited fax advertisements;
- 27 b) Whether the Defendants' faxes advertised the commercial  
28 availability or quality of property, goods, or services;
- c) The manner and method the Defendants used to compile or obtain

1 the list of fax numbers to which they sent Exhibit "A" and other unsolicited  
2 faxed advertisements;

3 d) Whether the Defendants faxed advertisements without first  
4 obtaining the recipient's prior permission or invitation;

5 e) Whether the Defendants sent the faxed advertisements knowingly,  
6 willfully or intentionally;

7 f) Whether the Defendants violated the provisions of 47 U.S.C. § 227  
8 and § 17538.43 and the regulations promulgated thereunder;

9 g) Whether the faxes contain an "opt-out notice" that complies with  
10 the requirements of § (b)(1)(C)(iii) of the Act, and the regulations promulgated  
11 thereunder, and the effect of the failure to comply with such requirements;

12 h) Whether the Defendants should be enjoined from faxing  
13 advertisements in the future;

14 i) Whether the Plaintiff and the other members of the class are  
15 entitled to statutory damages; and

16 j) Whether the Court should award treble damages.

17 22. Typicality (F. R. Civ. P. 23 (a) (3)): The Plaintiff's claims are typical of  
18 the claims of all class members. The Plaintiff received the same faxes as the faxes sent  
19 by or on behalf of the Defendants advertising goods and services of the Defendants  
20 during the Class Period. The Plaintiff is making the same claims and seeking the same  
21 relief for itself and all class members based upon the same federal statute. The  
22 Defendants have acted in the same or in a similar manner with respect to the Plaintiff  
23 and all the class members by sending Plaintiff and each member of the class the same  
24 faxes.

25 23. Fair and Adequate Representation (F. R. Civ. P. 23 (a) (4)): The  
26 Plaintiff will fairly and adequately represent and protect the interests of the class. It is  
27 interested in this matter, has no conflicts and has retained experienced class counsel to  
28 represent the class.

24. Need for Consistent Standards and Practical Effect of Adjudication (F. R. Civ. P. 23 (b) (1)): Class certification is appropriate because the prosecution of individual actions by class members would: (a) create the risk of inconsistent adjudications that could establish incompatible standards of conduct for the Defendants, and/or (b) as a practical matter, adjudication of the Plaintiff's claims will be dispositive of the interests of class members who are not parties.

25. Common Conduct (F. R. Civ. P. 23 (b) (2)): Class certification is also appropriate because the Defendants have acted and refused to act in the same or similar manner with respect to all class members thereby making injunctive and declaratory relief appropriate. The Plaintiff demands such relief as authorized by 47 U.S.C. §227 and the California Business Code § 17538.43.

26. Predominance and Superiority (F. R. Civ. P. 23 (b) (3)): Common questions of law and fact predominate over any questions affecting only individual members, and a class action is superior to other methods for the fair and efficient adjudication of the controversy because:

a) Proof of the claims of the Plaintiff will also prove the claims of the class without the need for separate or individualized proceedings;

b) Evidence regarding defenses or any exceptions to liability that the Defendants may assert and attempt to prove will come from the Defendants' records and will not require individualized or separate inquiries or proceedings;

c) The Defendants have acted and are continuing to act pursuant to common policies or practices in the same or similar manner with respect to all class members;

d) The amount likely to be recovered by individual class members does not support individual litigation. A class action will permit a large number of relatively small claims involving virtually identical facts and legal issues to be resolved efficiently in one (1) proceeding based upon common proofs; and

e) This case is inherently manageable as a class action in that:



(i) The Defendants identified persons or entities to receive the fax transmissions and it is believed that the Defendants' computer and business records will enable the Plaintiff to readily identify class members and establish liability and damages;

(ii) Liability and damages can be established for the Plaintiff and the class with the same common proofs;

(iii) Statutory damages are provided for in the statute and are the same for all class members and can be calculated in the same or a similar manner;

(iv) A class action will result in an orderly and expeditious administration of claims and it will foster economics of time, effort and expense;

(v) A class action will contribute to uniformity of decisions concerning the Defendants' practices; and

(vi) As a practical matter, the claims of the class are likely to go unaddressed absent class certification.

## COUNT I

### **Claim for Relief for Violation of the JFPA, 47 U.S.C. § 227 *et seq.* Opt-Out**

27. The JFPA makes it unlawful for any person to "use any telephone facsimile machine, computer or other device to send, to a telephone facsimile machine, an unsolicited advertisement ..." 47 U.S.C. § 227(b)(1)(C).

28. The JFPA defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise." 47 U.S.C. § 227 (a) (5).

29. **Opt-Out Notice Requirements.** The JFPA strengthened the prohibitions against the sending of unsolicited advertisements by requiring, in §(b)(1)(C)(iii) of the Act, that senders of faxed advertisements place a clear and



conspicuous notice on the first page of the transmission that contains the following among other things (hereinafter collectively the “Opt-Out Notice Requirements”):

1. a statement that the recipient is legally entitled to opt-out of receiving future faxed advertisements – knowing that he or she has the legal right to request an opt-out gives impetus for recipients to make such a request, if desired;
2. a statement that the sender must honor a recipient’s opt-out request within 30 days and the sender’s failure to do so is unlawful – thereby encouraging recipients to opt-out, if they did not want future faxes, by advising them that their opt-out requests will have legal “teeth”;
3. a statement advising the recipient that he or she may opt-out with respect to all of his or her facsimile telephone numbers and not just the ones that receive a faxed advertisement from the sender – thereby instructing a recipient on how to make a valid opt-out request for all of his or her fax machines.

The requirement of (1) above is incorporated from § (b)(D)(ii) of the Act. The requirement of (2) above is incorporated from § (b)(D)(ii) of the Act and the rules and regulations of the Federal Communications Commission (the “FCC”) in ¶31 of its 2006 Report and Order (*In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act, Junk Prevention Act of 2005*, 21 F.C.C.R. 3787, 2006 WL 901720, which rules and regulations took effect on August 1, 2006). The requirements of (3) above are contained in § (b)(2)(E) of the Act and incorporated into the Opt-Out Notice Requirements via § (b)(2)(D)(ii). Compliance with the Opt-Out Notice Requirements is neither difficult nor costly. The Opt-Out Notice Requirements are important consumer protections bestowed by Congress upon the owners of the telephone lines and fax machines giving them the right, and means, to stop unwanted faxed advertisements.

30. **2006 FCC Report and Order.** The JFPA, in § (b)(2) of the Act,

1 directed the FCC to implement regulations regarding the JFPA, including the JFPA's  
 2 Opt-Out Notice Requirements and the FCC did so in its 2006 Report and Order, which  
 3 in addition provides among other things:

4 A. The definition of, and the requirements for, an established business  
 5 relationship for purposes of the first of the three prongs of an exemption to liability  
 6 under § (b)(1)(C)(i) of the Act and provides that the lack of an "established business  
 7 relationship" precludes the ability to invoke the exemption contained in § (b)(1)(C) of  
 8 the Act (*See* 2006 Report and Order ¶¶8-12 and 17-20);

9 B. The required means by which a recipient's facsimile telephone  
 10 number must be obtained for purposes of the second of the three prongs of the  
 11 exemption under § (b)(1)(C)(ii) of the Act and provides that the failure to comply with  
 12 these requirements precludes the ability to invoke the exemption contained in §  
 13 (b)(1)(C) of the Act (*See* 2006 Report and Order ¶¶13-16);

14 C. The things that must be done in order to comply with the Opt-Out  
 15 Notice Requirements for the purposes of the third of the three prongs of the exemption  
 16 under § (b)(1)(C)(iii) of the Act and provides that the failure to comply with these  
 17 requirements precludes the ability to invoke the exemption contained in § (b)(1)(C) of  
 18 the Act (*See* 2006 Report and Order ¶¶24-34);

19 D. The failure of a sender to comply with the Opt-Out Notice  
 20 Requirements precludes the sender from claiming that a recipient gave "prior express  
 21 permission or invitation" to receive the sender's fax (*See* Report and Order ¶48);

22 As a result thereof, a sender of a faxed advertisement who fails to comply with  
 23 the Opt-Out Notice Requirements has, by definition, transmitted an unsolicited  
 24 advertisement under the JFPA. This is because such a sender can neither claim that  
 25 the recipients of the faxed advertisement gave "prior express permission or invitation"  
 26 to receive the fax nor can the sender claim the exemption from liability contained in §  
 27 (b)(C)(1) of the Act.

28 31. **The Faxes.** Defendants sent on or about November 21, 2014, November

24, 2014, December 8, 2014, December 29, 2014 and January 6, 2015, advertisements via facsimile transmission from telephone facsimile machines, computers, or other devices to the telephone lines and facsimile machines of Plaintiff and members of the Plaintiff Class. The Faxes constituted advertisements under the **Act**. Defendants failed to comply with the Opt-Out Requirements in connection with the Faxes. The Faxes were transmitted to persons or entities without their prior express permission or invitation and/or Defendants are precluded from asserting any prior express permission or invitation because of the failure to comply with the Opt-Out Notice Requirements. By virtue thereof, Defendants violated the JFPA and the regulations promulgated thereunder by sending the Faxes via facsimile transmission to Plaintiff and members of the Class.

## COUNT II

### **Claim for Relief for Violation of the JFPA, 47 U.S.C. § 227 *et seq.* Unsolicited**

32. **Defendant's Other Violations.** Plaintiff is informed and believes, and upon such information and belief avers, that during the period preceding four years of the filing of this Complaint and repeatedly thereafter, Defendants have sent via facsimile transmission from telephone facsimile machines, computers, or other devices to telephone lines and facsimile machines of members of the Plaintiff Class faxes that constitute advertisements under the JFPA that were transmitted to persons or entities without their prior express permission or invitation. By virtue thereof, Defendants violated the JFPA and the regulations promulgated thereunder. Plaintiff is informed and believes, and upon such information and belief avers, that Defendants may be continuing to send unsolicited advertisements via facsimile transmission in violation of the JFPA and the regulations promulgated thereunder, and absent intervention by this Court, will do so in the future.

33. The TCPA/JFPA provides a private right of action to bring this action on behalf of Plaintiff and the Plaintiff Class to redress Defendants' violations of the Act, and provides for statutory damages. 47 U.S.C. § 227(b)(3). The Act also provides that

1 injunctive relief is appropriate. *Id.*

2 34. The JFPA is a strict liability statute, so the Defendants are liable to the  
 3 Plaintiff and the other class members even if their actions were only negligent.

4 35. The Defendants knew or should have known that (a) the Plaintiff and the  
 5 other class members had not given express invitation or permission for the Defendants  
 6 or anybody else to fax advertisements about the Defendants' goods or services; (b) the  
 7 Plaintiff and the other class members did not have an established business  
 8 relationship; and (c) Defendants transmitted advertisements.

9 36. The Defendants' actions caused damages to the Plaintiff and the other  
 10 class members. Receiving the Defendants' junk faxes caused the recipients to lose  
 11 paper and toner consumed in the printing of the Defendants' faxes. Moreover, the  
 12 Defendants' faxes used the Plaintiff's and each class member's telephone lines and  
 13 fax machine. The Defendants' faxes cost the Plaintiff and each class member time, as  
 14 the Plaintiff and its employees, as well as each class member and their employees,  
 15 wasted their time receiving, reviewing and routing the Defendants' unauthorized  
 16 faxes. That time otherwise would have been spent on the Plaintiff's and each of the  
 17 class member's business activities. The Defendants' faxes unlawfully interrupted the  
 18 Plaintiff's and other class members' privacy interests in being left alone. Finally, the  
 19 injury and property damage sustained by Plaintiff and the other class members from  
 20 the sending of Defendants' advertisements occurred outside of Defendants' premises.

### 21 **COUNT III**

#### 22 **Claim for Relief for Violation of California Business Code at § 17538.43**

23 37. Independent of the above, the California Business Code at § 17538.43  
 24 provides for a private right of relief against Defendant for the conduct alleged above.

25 38. Defendants numerous violations of the California Business Code §  
 26 17538.43 were made by sending the unsolicited faxes to Plaintiff and the Class.

27 39. Plaintiff and the Class are entitled to statutory damages in an amount to  
 28 be determined at trial.

GERAGOS & GERAGOS, APC  
HISTORIC ENGINE CO. NO. 28  
644 SOUTH FIGUEROA STREET  
LOS ANGELES, CALIFORNIA 90017-3411

1 WHEREFORE, Plaintiff, ERIC B. FROMER CHIROPRACTIC, INC.,  
2 individually and on behalf of all others similarly situated, demands judgment in its  
3 favor and against Defendants, MOLINA HEALTHCARE OF CALIFORNIA,  
4 MOLINA HEALTHCARE OF CALIFORNIA PARTNER PLAN, INC., MOLINA  
5 HEALTHCARE, INC and JOHN DOES 1-10, jointly and severally, as follows:

6 A. That the Court adjudge and decree that the present case may be properly  
7 maintained as a class action, appoint the Plaintiff as the representative of the class and  
8 appoint the Plaintiff's counsel as counsel for the class;

9 B. That the Court award actual monetary loss from such violations or the  
10 sum of five hundred dollars (\$500.00) for each violation, trebled due to Defendants'  
11 knowing violation, whichever is greater;

12 C. That Court enjoin the Defendants from additional violations; and

13 D. That the Court award pre-judgment interest, costs and such further relief  
14 as the Court may deem just and proper.

15  
16  
17  
18 DATED: August 21, 2015

GERAGOS & GERAGOS APC

19  
20 By: /s/ MARK J. GERAGOS

21 MARK J. GERAGOS

22 BEN MEISELAS

23 Attorneys for Plaintiff, ERIC B. FROMER  
24 CHIROPRACTIC, INC., a California  
25 corporation, individually and as the  
26 representative of a class of similarly-situated  
27 persons.  
28